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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

IN THE MATTER OF FRANK A. LEVERING, DECEASED:

FRANCIS A. LEVERING, JR.,

Petitioner,

v.

BLAIR S. LEVERING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

I. OPINIONS BELOW.

(A) A copy of the unreported opinion of the Register's Court of the State of Delaware in and for New Castle County bears the date May 2, 1969 and is appended hereto (1A, infra).

(B) A copy of the opinion of the Orphans Court of the State of Delaware in and for New Castle County which bears the date January 6, 1970 and is not yet reported is appended hereto (2A, infra).

(C) A copy of the opinion of the Supreme Court of the State of Delaware which bears the date September 23, 1970 and is not yet reported is appended hereto (3A, infra).

(D) A copy of the denial of the Petition for Re-Argument bears the date October 7, 1970 and is appended hereto (4A, infra).

II. JURISDICTIONAL GROUNDS.

This petition seeks a writ of certiorari to the Supreme Court of the State of Delaware with respect to its judgment dated and entered on September 23, 1970, which affirmed the judgment of the Orphans Court of the State of Delaware in and for New Castle County and the subsequent denial by the Supreme Court of the State of Delaware on October 7, 1970 of a Petition for Re-Argument.

Jurisdiction of this Court is predicated upon 62 Stat. 929 (28 U. S. C. A. § 1257(3)).

III. QUESTION PRESENTED.

Was the petitioner denied due process by the Orphans Court's refusal to hear live testimony in a trial de novo on appeal from the Register of Wills.

IV. CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE.

Article XIV, Amendments to the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 3, Section 22 of the Constitution of the State of Delaware.

Election and Term of Office of Certain County Officers; Commission; Successive Terms of Sheriff. The terms of office of Prothonotaries, Clerks of the Peace, Registers of Wills, Recorders, Registers in Chancery and Clerks of the Orphans' Court shall be four years; and the terms of office of Sheriffs and Coroners shall be two years. These officers shall be chosen by the qualified electors of the respective counties at general elections, and be commissioned by the Governor.

No person shall be twice elected Sheriff in any term of four years.

Article 4, Section 31 of the Constitution of the State of Delaware.

Registers of Wills; Depositions of Witnesses; Process; Appeals to Orphans' Court; Disqualification of Register for Interest. The Registers of Wills of the several counties shall respectively hold the Register's Court in each County. Upon the litigation of a cause the depositions of the witnesses examined shall be taken at large in writing and made part of the proceedings in the cause. This court may issue process throughout the State. Appeals may be taken from a Register's Court to the Orphans' Court. In cases where a Register of Wills is interested in questions concerning the probate of wills, the granting of letters of administration, or executors' or administrators' accounts, the cognizance thereof shall belong to the Orphans' Court. (Formerly § 33. Renumbered § 31 and amended 48 Del. Laws, Ch. 109, approved May 14, 1951).

V. STATEMENT OF THE CASE.

This is a will contest case involving the substantial estate of Frank A. Levering, hereafter referred to as "Testator", who died in New Castle County, Delaware on September 11, 1968. A Last Will and Testament of the testator dated June 15, 1968 was duly presented to the Register of Wills of New Castle County, Delaware on September 11, 1968 by Francis A. Levering, Jr., hereafter referred to as "Petitioner" herein, a grandson of the testator.

On September 13, 1968, a caveat was filed with the Register of Wills by Blair S. Levering, son of the testator, requesting that the will dated June 15, 1968 not be admitted to probate on the grounds that the testator lacked testamentary capacity and was subjected to undue influence and, in addition, requesting that, instead, a Last Will and Testament executed by the testator on January 24, 1962, and a codicil thereto dated November 8, 1966, be admitted to probate. After hearings were held on the caveat, on May 2, 1969 the Register of Wills determined that the will dated June 15, 1968 was invalid on the grounds that the testator lacked testamentary capacity. The Register of Wills admitted to probate the will of the testator dated January 24, 1962 and the codicil thereto.

The petitioner then appealed to the Orphans' Court from the decision of the Register of Wills. On January 6, 1970, the Orphans' Court affirmed the Order of the Register of Wills.

On March 3, 1970, the petitioner appealed to the Supreme Court of the State of Delaware and on September 23, 1970 the Supreme Court affirmed the decision of the Orphans' Court. Subsequently the petitioner filed in the Supreme Court of the State of Delaware a Petition for Re-Argument which was denied on October 7, 1970.

This is petitioner's Petition for Writ of Certiorari.

VI. STATEMENT OF FACTS.

The hearing before the Register of Wills of New Castle County revealed the following facts:

Frank A. Levering, the testator was an elderly strong-willed individual who had several children and many grandchildren including Francis A. Levering, Jr., the petitioner.

The testator was admitted to the Memorial Hospital in Wilmington, Delaware on May 27, 1968 complaining of severe chest pains. He was eventually released to a nursing home and then readmitted to the hospital where he died on September 11, 1968 at the age of 93.

On June 10, 1968 the petitioner and his wife visited the testator in the hospital who indicated his desire to have a will leaving "everything" to the petitioner. After further similar requests, the petitioner had such a will prepared and on June 15, 1968, shortly after 9:00 A. M., the testator executed the contested will with his mark before the subscribing witnesses, John J. Minnick, Chief Underwriter of the local Federal Housing Administration office and Mrs. Florence Walsh, Deputy Comptroller of New Castle County and the aunt of the petitioner's wife, after it was read and explained to him. Upon being questioned whether he understood what he was doing, the testator indicated he did and that it was something he should have done a long time ago.

There is ample testimony concerning the physical and mental condition of the testator prior to and after the execution of the will. The record reflects that the testator was administered various drugs, medicines, sedatives and stimulants.

Testimony concerning the mental condition of the testator indicated that, at times, he was confused, disoriented, sleepy, dopey, and would sing, and had some delusions. There was also testimony by the attending nurses

and others that, at other times, the testator was rational and lucid and was aware of his surroundings.

The testimony of the two subscribing witnesses and the petitioner indicated that the testator was mentally clear and rational at the precise time the will was executed. Mr. Minnick specifically testified that he would not have acted as a subscribing witness if he had been of the opinion that the testator was incompetent. However only two other witnesses observed the testator at the approximate time the will was signed—the attending physician, Dr. John A. Chrzanowski and Sallie A. Levering, the testator's daughter-in-law. Dr. Chrzanowski testified that at 4:30 A. M. on June 15, 1968 the testator was given Demerol, a sedative, and later at 9:00 was administered heart stimulants and blood dilators. Mrs. Levering observed the testator shortly after 9:30 A. M. on that date but he became nauseated after her arrival and she was unable to make any statement concerning his mental condition at that time.

The testimony further indicated that the petitioner lived with the testator for a substantial period of time, visited frequently with him, handled money matters and kept books for him and was provided with the combination of his safe.

The Register of Wills found that the testator lacked testamentary capacity at the time of the execution of the contested will on June 15, 1968. On appeal to the Orphans' Court, that Court declined to hear any of the testimony and decided the case on the Register's record. It affirmed the Register's decision.

The petitioner appealed to the Supreme Court of the State of Delaware and argued that among other errors, the Orphans' Court erred in refusing to hear live testimony in a trial *de novo*. The Supreme Court affirmed the decision of the Orphans' Court and subsequently denied a Petition for Re-Argument.

VII. ARGUMENT.

The Petitioner Was Denied Due Process by the Orphans' Court's Refusal to Hear Any Live Testimony in a Trial *De Novo* on Appeal From the Register of Wills.

In the State of Delaware pursuant to the Delaware Constitution, Article 3, Section 22, the Register of Wills is elected by the voters of each county and no qualifications whatsoever are specified or required for an individual to be so elected. The Register is essentially the only official in the State of Delaware with judicial powers who is elected and not appointed with specified necessary qualifications. Although he does have judicial powers, his main function is an administrative one and, in fact, he is elected along with the clerks of the various courts and the Recorder of Deeds.

The Register of Wills has "sole original jurisdiction over the probate of wills and the review thereof." *In re Harmon's Will*, 95 A. 2d 47, 49 (Super. Ct., Del. 1953). Article 4, Section 31, of the Delaware Constitution provides that an "appeal" from the Register of Wills is to be taken to the Orphans' Court, a branch of the Superior Court, which is essentially the State's trial court. From this court an appeal is taken to the Supreme Court of the State of Delaware which is the State's highest court.

On appeal to the Orphans' Court, the question of that court's scope of review has arisen and has been decided. So that:

> "By the time of In re Ainscow's Purported Will, 2 Terry 148, 17 A. 2d 227 (1940), it seemed settled that the hearing on an appeal from the Register to the Superior Court amounted to a trial *de novo*, with the court's power to direct an issue to a jury in such retrial to be beyond question." (Emphasis added.) *Nardo v. Nardo*, 209 A. 2d 905, 910 (S. C., Del. 1965).

Consequently in the *Nardo* case, the Supreme Court of Delaware held that the "scope of review in the Orphans' Court is the same as that which existed in, and was exercised by the Superior Court . . .", namely "to *retry* the case on both law and fact with or without the assistance of a jury" (Emphasis added).

It would logically appear that a trial *de novo* is just that—a new trial. In fact, "de novo" is defined by Black's Law Dictionary, Fourth Edition at page 483, as "anew; afresh; a second time". The cases are replete with statements that a trial *de novo* is a new trial "as if no action whatever had been instituted in the court below". See for example *Burstein v. Millikin Trust Co.*, 113 N. E. 2d 339, 341 (App. Ct. Ill. 1953).

Moreover, on an appeal to the Orphans' Court with a trial by jury, the case, of course, would have to be retried with the jury hearing live testimony. No less would seem proper or appropriate if the new trial is before a judge rather than a jury. In fact, due process can require no less.

In the instant case, the Orphans' Court denied the petitioner's request to hear live testimony and decided the case on the cold transcript of the testimony heard in the Register's Court. The Orphans' Court in refusing to hear any live testimony simply stated:

> "There was no indication that such presentation would differ in any material way from that presented below. Therefore, I declined to rehear any evidence in this case. Instead I reviewed the record in order to make de novo evaluation of the testimony." (A8-A9)

On appeal the Supreme Court of Delaware held that the Orphans' Court did not err in refusing to hear testimony and cited in support thereof *In re Collins*, 251 A. 2d 345 (Super. Ct., Del. 1969). In *In re Collins, supra*, at page 347,

the following standard as to whether a trial de novo is to be on the record or by live testimony is recited:

> ". . . If the Court finds, after a review of a verbatim record, that the result below was clearly correct, it is justified in refusing an application for a fresh hearing of the evidence. If the decision below is not clearly correct, then this Court should hold a fresh hearing of the evidence."

However, the Orphans' Court failed to make a finding that the result below was "clearly correct" but simply stated in its opinion that it was refusing to hear live testimony. The Court held that there was no "convincing evidence upon which a trier of fact could reasonably conclude that the testator had the requisite capacity to execute a will on June 15, 1968". Nevertheless, the Orphans' Court went on to state in its opinion that:

> "The only testimony that Mr. Levering was lucid at the time he executed the instrument came from the proponent, an interested party as sole beneficiary under the purported will, and the two witnesses to the instrument, one a social and business associate of the proponent who had never met or known the testator, and the other an aunt of the proponent's wife, who had not had occasion to visit and converse with the decedent for a couple of years prior to his hospitalization." (A10)

The petitioner contends that the Orphans' Court's refusal to hear live testimony, specially where the law provides for an appeal with a trial *de novo*, is a denial of his rights to due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

In a trial, whether initially or *de novo*, the Court's decision unquestionably revolves around the credibility of

witnesses. Generally, that's what a trial is all about. And since time immemorial, the issue of credibility has been based on a large extent on the demeanor of the witness. The cold printed transcript cannot begin to enlighten a trier of fact as to the credibility of a witness. Trials would be simple indeed if the trier of facts only had to review written records. The crucial issue in most cases is "who do you believe" and that task is a difficult task indeed which cannot be justly performed without seeing and hearing the live witnesses.

In the instant case there can be no doubt that the central issue before the trier of fact was the credibility of the witnesses since there was testimony, at least by the two subscribing witnesses, that the testator did have the capacity to execute the contested will. In fact, in Delaware, it is clear that testamentary capacity of the testator must be determined as it existed at the precise time that the will was executed and not as of the time prior to or after the execution of the will.

Moreover under Delaware law, the subscribing witnesses are placed in a special position since the law makes a distinction between the subscribing witnesses to a will and other witnesses. The subscribing witnesses being placed by the law around the testator at the time of the execution of his will, for the special purpose, among others, of ascertaining and judging his capacity.

If the Register's Court believed the petitioner and the subscribing witnesses, its decision would have been different. The Orphans' Court also apparently did not give much weight to the testimony of the subscribing witnesses. There can be no doubt therefore that the issue was one of credibility which without question can best be decided by seeing and hearing the live testimony of the witnesses.

Moreover, no matter how efficient or how conscientious the Register is, a trial before him cannot rise to the level

of a trial in the Superior or Orphans' Court. For example, in this case, the attorneys for both parties acted not only at attorneys but also as witnesses which is not only practically unheard of in the Superior Court but is discouraged, if not prohibited. The law, of course, provides for an appeal to the Orphans' Court with a trial *de novo;* but in the instant case, the petitioner received what amounts to an appellate review rather than a new trial.

VIII. CONCLUSION.

The Orphans' Court's refusal to hear live testimony in a trial *de novo* on an appeal from the Register of Wills was a denial of the petitioner's due process. Consequently, it is respectfully submitted that the petition for certiorari be granted and the judgment of the Supreme Court of the State of Delaware be reversed.

Respectfully submitted,

L. Vincent Ramunno,
Attorney for Petitioner.

APPENDIX.

1. OPINION OF THE REGISTER OF WILLS FOR NEW CASTLE COUNTY, DELAWARE

IN THE

REGISTER'S COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF THE ESTATE OF FRANK A. LEVERING

Opinion.

This matter involves the review of the admission to probate of an instrument purporting to be the Last Will and Testament of Frank A. Levering.

The proponent is the decedent's grandson, Francis A. Levering, Jr., represented by David Snellenberg, Esquire; and the contestant is the decedent's son, Blair S. Levering, represented by Joseph H. Flanzer, Esquire.

Frank A. Levering died on September 11, 1969. On that same day an instrument dated June 15, 1968, and purported to be Frank A. Levering's Last Will and Testament was filed in the Office of the Register of Wills for New Castle County.

On September 13, 1968, a Caveat against the allowance of the instrument as a will was duly filed by Joseph H. Flanzer, Esquire, on behalf of Blair S. Levering, a beneficiary named in another purported will of the decedent,

dated January 24, 1962. Hearings were held on the Caveat on October 1, 16, 17, 18 and 22, 1968.

Two questions were raised by the contestant:

(1) Whether Frank A. Levering had the requisite mental capacity to make the purported will

(2) Whether at the time Frank A. Levering made said purported will, he was subjected to the undue influence of his grandson Francis A. Levering, Jr.

After a deliberate and exhaustive review of the eight hundred and eighty-five (885) page record and the more than two hundred (200) pages of medical records and other exhibits, I have reached the following decision:

Frank A. Levering lacked the mental capacity required to make the purported will dated June 15, 1968.

My decision is based primarily upon the following considerations:

Since the instrument was executed on June 15, 1968, that is the most important date. If the testator had capacity during the time it took for him to execute the instrument, the instrument would have to be ruled a valid will.

In considering the evidence, great weight was given to the testimony of the doctors and nurses who treated the decedent during the period from May 27, 1968, when he was admitted to the Memorial Division, to June 15, 1968, when the instrument was executed. Those men and women who testified as to his condition during that period were professionals in their field who were wholly unrelated to the principals in the case. Their independent testimony showed that Frank A. Levering was a confused, bewildered, disoriented man of 93 years. He was in a weakened condition due to a combination of factors, including the trauma of a heart seizure suffered on May 27, heavy sedation, and a general condition of arteriosclerosis.

Doctor John Chrzanowski, a medical doctor with twenty-two years' experience, testified that he saw the decedent every day from May 27 to June 14. In his opinion, Frank A. Levering was absolutely unaware of his surroundings. Under oath, Dr. Chrzanowski made the following statement: "If he (Levering) had any lucid moments, he never had them when I was with him."

"He was not lucid. He did not know what went on. He did not know the time of day. He did not know the day, did not know anything."

Further evidence showed that fifty (50) milligrams of Demoral were given to Frank A. Levering on June 15, at 4:30 A. M. The instrument in question was said to have been executed on that day at about 9:20 A. M.

Joseph H. Flanzer, Esquire, representing the contestant, asked Dr. Chrzanowski:

Q. "What effect in your opinion, Doctor, would fifty milligrams of Demoral have on a gentlemen of Mr. Levering's constitution and his age?"

A. "At his age, a man of 93 years of age, arteriosclerotic, I am sure it would knock him out anywhere from four to eight hours. It may make him more confused and so forth. It may make him dopey, sleepy."

Q. "It would further becloud his mind?"

A. "Oh, definitely."

At another point in his testimony, Dr. Chrzanowski concluded, "If he made a will or anything, he couldn't have been mentally competent to do it . . ."

Another doctor, A. Henry Clagett, Jr., testified that he saw Frank A. Levering on May 27, 28, 29, 30, 31, June 1, 4, 11, 15, 16, and the 17th through to the 23d, inclusive. Here are some questions asked of him and his responses:

Q. "What was his (Levering's) general condition so far as mental awareness of the world around him from the time you first observed him until you last saw him Doctor?"

A. "Well, from my observation, he never gave any evidence of being aware of where he was or the conditions under which he was living.

Q. "Was there ever any period as far as you were able to determine when you would say that he was lucid during the month that you saw him at the hospital? And the one time at the nursing home?"

A. "Not when I was there, no sir."

* * *

The testimony of the nurses was comparable to that of the doctors. Mrs. Edith Cyeyk, R.N., attended Frank A. Levering on May 27 and 28, and said he was "confused at times." Mrs. Margaret Lewandowski, R.N., who has been a registered nurse for twenty years, said that she worked regular eight-hour shifts attending Frank A. Levering from June 3 to June 28, except for June 14 and 15. She said that he was very confused "99 percent of the time." She went on to say that on at least one occasion at three o'clock in the morning he insisted she dress him so he could start painting; on another occasion he asked her if she had tied up the horses for the night.

Miss Catherine Gallagher, a registered nurse, attended the decedent on fifteen straight days for eight-hour periods each day. She testified that the decedent was senile and confused from the time she started to care for him on May 27 until June 10, the last day she saw him.

Another impressive witness was Reverend Leon Wallman Young, a minister of the Gospel with the Christian and Missionary Alliance, who testified that he visited Frank A. Levering at least once and "maybe twice a week" during Mr. Levering's stay in the hospital in May and June of 1968. Reverend Young's responses were consistent with those of the doctors and nurses:

Q. "What did you propose to do when you got there?"

A. "Well, this is difficult to say because if the man is rational, of course, I would talk to him about spiritual things. Of course, when I got there, he wasn't rational in my opinion. Therefore, I wasn't able to discuss anything."

* * *

Q. "What was his mental condition on each occasion when you went to visit with him during that time, that one-month period?"

A. "Each time he seemed confused."

Q. "Did he ever appear to you to have lucid intervals when he was aware of the world around him?"

A. "He didn't seem to, no."

* * *

The proponent, on the other hand, proposed to show that the decedent was lucid when the instrument was executed. However, I cannot conclude that at the time of execution the decedent evidenced a degree of lucidity which enabled him to make a valid will. In my opinion, the testimony of the independent witnesses is overwhelming and clearly demonstrates that Frank A. Levering could not have had capacity at the time of the execution of the instrument.

Thus, it is hereby ordered:

(1) The instrument dated June 15, 1968, is declared invalid, and

(2) My order dated September 11, 1968, admitting said instrument to probate is revoked, and

(3) The instrument dated January 24, 1962, and the codicil thereto, dated November 8, 1966, shall be received for admission to probate.

In view of the fact that the instrument in question has been declared invalid on the grounds of incapacity, it is un-

necessary for me to render an opinion as to the second question, that of undue influence.

LAWRENCE M. SULLIVAN,
Lawrence M. Sullivan
Register of Wills.

DATED: MAY 2, 1969.

2. OPINION OF THE ORPHANS' COURT OF NEW CASTLE COUNTY, DELAWARE.

IN THE
ORPHANS' COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ORPHANS' COURT No. 1768-B
1968

IN THE MATTER OF THE ESTATE OF
FRANK A. LEVERING, DECEASED

Opinion.

(JANUARY 6, 1970)

Appeal from Register of Wills. Decision of Register of Wills affirmed after consideration of the case de novo on the record made below.

David Snellenburg, II, Esquire, attorney for Francis Levering, Proponent-Appellant

Joseph H. Flanzer, Esquire, attorney for Blair S. Levering, Contestant-Appellee

CHRISTIE, *J.*

This is an appeal from an order of the Register of Wills, declaring invalid the purported will of the decedent dated June 15, 1968, and revoking the Register's earlier order of September 11, 1968, which had admitted the instru-

ment to probate. The order appealed from provides for "the admission to probate of a will of the decedent dated January 24, 1962, and the codicil thereto, dated November 8, 1966." The Register found that the decedent lacked testamentary capacity at the time of the execution of the instrument dated June 15, 1968. The proponent of the 1968 instrument is the grandson of the decedent and is named in the instrument as executor and sole beneficiary of the decedent's estate. He has brought this appeal seeking to reverse the decisions of the Register of Wills.

The decedent, Frank A. Levering, was 93 years of age at his death on September 11, 1968. He was hospitalized on May 27, 1968, suffering from generalized arteriosclerosis. On June 28, 1968, he was admitted to a nursing home. During all of his hospital stay he was under heavy sedation, frequently with physical restraints.

On June 15, 1968, at about the middle of the period of hospitalization the deceased executed the purported will. The instrument had been prepared and presented to him by the proponent and was executed by holding deceased's hand on the top of a pen while one of the witnesses wrote an "X". The evidence is conflicting as to the cordiality of the relationship between the decedent and his grandson. In the instrument of June 15, 1968, the proponent-grandson is named as his sole beneficiary and executor to the exclusion of the testator's six surviving children.

An appeal to this Court from the Register of Wills results in a trial de novo on the facts and law, considered in the light of the record as a whole. This Court may call for the presentation of some of or all of the evidence and the proponent requested permission to represent some of the testimony which had been considered by the Register. There was no indication that such presentation would differ in any material way from that presented below. Therefore, I de-

clined to rehear any evidence in this case. Instead, I reviewed the record in order to make de novo evaluation of the testimony.

I conclude that under the circumstances here present the record provides no convincing evidence upon which a trier of fact could reasonably conclude that the testator had the requisite capacity to execute a will on June 15, 1968. Indeed, the great preponderance of the evidence is to the contrary. Therefore, this Court need go no further and the order of the Register denying probate to the purported will will be affirmed. *Nardo v. Nardo*, — Storey —, 209 A. 2d 905 (1965); *In the Matter of the Purported Last Will & Testament of Estelle B. Collins*, Del. Supr., 251 A. 2d 345 (1969).

All of the disinterested persons who were in constant and regular attendance upon the decedent prior to, at, and immediately following the time of the execution of the purported will were of the unanimous opinion that Mr. Levering was totally unaware of where he was, who was with him and what he was doing. The clear preponderance of the evidence of doctors, nurses, visitors and friends indicates, without exception, that he was "not lucid", "knocked out", "confused", "dopey", "sleepy", "beclouded", "irrational", "incompetent", "unaware", "violent" and so forth. The medical evidence indicated that he was receiving heavy doses of sedatives.

The record contains no convincing evidence to indicate that Mr. Levering was rational and lucid at any time within the period including the date of June 15, 1968. Medical testimony that arteriosclerotic patients in general may exhibit periods of lucidity alternating with periods of confusion carries little or no weight in view of the specific, overwhelming evidence that this particular arteriosclerotic, 93 year old man, was not regarded as capable or lucid at any

time during his hospital stay by anyone who saw him regularly.

The only testimony that Mr. Levering was lucid at the time he executed the instrument came from the proponent, an interested party as sole beneficiary under the purported will, and the two witnesses to the instrument, one a social and business associate of the proponent who had never met or known the testator, and the other an aunt of the proponent's wife, who had not had occasion to visit and converse with the decedent for a couple of years prior to his hospitalization.

There is an abundance of evidence indicating that the decedent lacked the requisite testamentary capacity to execute the instrument of June 15, 1968.

The testimony presented on behalf of the proponent is not convincing. The presumptions of testamentary capacity and of sanity are here clearly overcome. I find that the testator lacked testamentary capacity at the time the testator executed the instrument of June 15, 1968.

The order of the Register of Wills is affirmed. It is so ordered.

3. OPINION OF THE SUPREME COURT OF DELAWARE.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

No. 32, 1970

IN THE MATTER OF FRANK A. LEVERING, DECEASED:

FRANCIS A. LEVERING, JR.,
PROPONENT-APPELLANT BELOW,
Appellant,

v.

BLAIR S. LEVERING,
CONTESTANT, APPELLEE BELOW,
Appellee.

(September 23, 1970)

WOLCOTT, *Chief Justice;* HERRMANN, *Justice,* and DUFFY, *Chancellor,* sitting.

Upon appeal from the Orphans' Court. Affirmed.

Kenneth W. Lewis, James F. Kruzinski, and Joseph A. Julian, all of Wilmington, for appellant.

Joseph H. Flanzer of Flanzer & Isaacs, Wilmington, for appellee.

HERRMANN, *Justice:*

This is an appeal from the judgment of the Orphans' Court affirming the conclusion of the Register of Wills that the testator, Frank A. Levering, did not possess the requisite testamentary capacity when he executed the purported Will contested in this action. The Register had denied probate.

The opinion of the Orphans' Court will appear at — A.(2d) —.

We have reviewed the record in this cause and the facts and the law involved. We agree with the inferences and deductions of the Orphans' Court, and its ultimate finding of lack of testamentary capacity at the time of the execution of the Will, all of which we find supported by sufficient evidence and the law. See *In re Collins*, Del. Supr., 251 A. (2d) 345 (1969).

The contention of the appellant that the Orphans' Court erred, in refusing to hear anew the testimony of the two subscribing witnesses, has been duly considered. We hold that there was no abuse of discretion in the Court's refusal to re-hear testimony previously heard by the Register of Wills and fully reported in the transcript of the record. See *In re Collins*, Del. Supr., 251 A. (2d) 345 (1969).

The contestant of the Will, appellee herein, alleged undue influence as well as lack of testamentary capacity in attacking the document. These were alternate grounds; the denial of probate on either ground rendered academic the other ground; and the Orphans' Court correctly stated that it need go no further after finding lack of testamentary capacity.

The proponent argues in this connection that the contention of undue influence rests upon a presumption of testamentary capacity; that, therefore, the assertion of undue influence requires abandonment of lack of testamentary

capacity as a ground of contest, citing *Connor v. Brown*, Del. Super., 3 A.(2d) 64 (1938). There is no merit in this argument; the cited case, which referred to a situation in which undue influence was the sole ground of the contest, does not so hold. As stated above, the contention of undue influence may be asserted properly as alternate to the contention of lack of testamentary capacity.

Affirmed.

4. ORDER OF THE SUPREME COURT OF DELAWARE DENYING PETITION FOR REHEARING.

SUPREME COURT OF DELAWARE

T. E. Townsend, Jr.
Clerk

Supreme Court Building
Dover, Delaware

October 7, 1970

To— Joseph Flanzer, Esquire
L. Vincent Ramunno, Esq.
Kenneth W. Lewis, Esq.
James F. Kruzinski, Esq.
Joseph A. Julian, Esq.

Re: Levering v. Levering, No. 32, 1970

This is to notify you that the Court has denied the Petition for Reargument in the above cause.

T E T, Jr.,
TET, Jr.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 1196

IN THE MATTER OF FRANK A. LEVERING, DECEASED:

FRANCIS A. LEVERING, JR.,

Petitioner.

v.

BLAIR S. LEVERING,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

JOSEPH H. FLANZER,
FLANZER & ISAACS,
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Wilmington, Delaware. 19801
Attorneys for Respondent.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

I. COUNTER-STATEMENT OF THE CASE.

Petitioner seeks a review of the judgment of the Supreme Court of the State of Delaware (A11), which judgment affirmed the judgment of the Orphans' Court of the State of Delaware, in and for New Castle County (A7), which in turn had affirmed a decision of the Register of Wills of New Castle County, Delaware (A1).

After an extensive and lengthy hearing, the Register of Wills determined that a particular will was invalid on the ground that the testator lacked testamentary capacity. The transcript of the hearing was reviewed by the Orphans' Court and again reviewed by the Supreme Court of Delaware.

The Supreme Court of Delaware rendered its decision after comprehensive briefs were filed and oral argument was held. After the decision of the Supreme Court was rendered, a Petition for Re-Argument was filed (B4). It was in the Petition for Re-Argument that the federal question for which review is now sought was raised for the first time. The Supreme Court of Delaware did not pass upon the question involved.

II. ARGUMENT.

The Petitioner Did Not Timely Raise the Federal Question for Which Review Is Now Sought.

Petitioner's brief in support of his Petition for a Writ of Certiorari does not set forth the stages in the proceedings and the manner in which the federal question now sought to be reviewed was raised. The Rule of this Honorable Court (Rule 23[f]) states that the statement of the case shall so specify and further requires the Petitioner to state the manner in which any such federal question was passed upon by the court, with specific references to the record.

It appears that the Petitioner has failed to comply with that portion of Rule 23(f) for the reason that to attempt to comply with it would affirmatively establish the failure on the part of the Petitioner to timely present this question for review by any of the State courts which heard the Petitioner's two appeals.

The Petitioner did not raise any federal question before the Orphans' Court of the State of Delaware, in and for New Castle County, when the first appeal was prosecuted from the decision of the Register of Wills. At that juncture, the issue could have been raised when the Orphans' Court was requested to hear the live testimony of the subscribing witnesses and declined to do so (A8-9).

Further, a request for certification of that question to the Supreme Court of Delaware could have been made by the Petitioner, but it was not. The request for certification could have been made pursuant to Delaware Supreme Court Rule 20, as amended (B1).

After the Orphans' Court rendered its opinion sustaining the decision of the Register of Wills, an appeal was prosecuted to the Delaware Supreme Court. Although there is some question about the timeliness of raising the federal question at that point, by virtue of Delaware Supreme Court Rule 5(7), which permits only the raising of any questions which had been fairly presented to the court below for decision, no attempt was made by the Petitioner to do so (B3).

It was only after the filing of briefs, oral argument and decision by the Delaware Supreme Court that the Petitioner, for the first time, in his Petition for Re-Argument, raised the issue of the existence of a federal question (B4).

The Supreme Court of Delaware denied the Petition for Re-Argument (A14).

The law of Delaware is that the Delaware Supreme Court will not hear and determine issues which have not been heard below (See *State v. Gulf Sulphur Corporation*, 231 A. 2d 470, Del. Supreme, 1967; *Wilmington Trust Co. v. Coulter*, 200 A. 2d 441, Del. Supreme, 1964; *Orzeck v. Englehart*, 195 A. 2d 375, Del. Supreme, 1963; *Feldman v. Foulke*, 178 A. 2d 479, Del. Supreme, 1962; *Robinson v. Meding*, 163 A. 2d 272, Del. Supreme, 1960).

Further, in the case of *People of State of New York v. Zimmerman*, 49 S. Ct. 61, 278 U. S. 63 (1928), this Honorable Court held that the record as a whole must show that the claimed invalidity was brought to the attention of the state court with fair precision and in due time. The appropriate Rule of this Court also requires that the federal question be timely raised for consideration. Clearly, the record shows that this has not been done.

III. CONCLUSION.

Rule 19 of this Honorable Court provides that a review on writ of certiorari is not a matter of right, but of sound judicial discretion. This Honorable Court has held in the past and its rules strongly infer that a writ of certiorari will not be granted if the Petitioner failed to timely raise the federal question. Accordingly, the Petition filed herein should be denied as the record shows that the Petitioner did not raise the federal question in a timely manner.

Respectfully submitted,

JOSEPH H. FLANZER,
FLANZER & ISAACS,
Attorneys for Respondent.

Appendix.

Rule 20. Proceedings on Certification of Questions of Law.

(1) *Who May Certify.* The Court of Chancery, the Superior Court, or the Orphans' Court, may, on petition or on its own motion, certify to this Court for its decision a question or questions of law arising in any cause before it prior to the entry of final judgment therein whenever there are important and urgent reasons for an immediate determination of such question or questions by this Court.

(2) *Requirements for Certification.* Proceedings on certification will be allowed within the sound judicial discretion of this Court. Certifications will be allowed in criminal causes only when in the opinion of the Court there are unusual and compelling public reasons for so doing. No certification will be allowed if the facts are in dispute. Without controlling or limiting the Court's discretion to hear proceedings on certification, the following are set forth as indicative of the character of the reasons justifying certification of questions of law to this Court:

(a) Where the question of law to be certified is of first instance in this state;

(b) Where the reported opinions of the lower courts of this state are conflicting upon the question of law to be certified;

(c) Where the question of law to be certified relates to the constitutionality, construction, or application of a statute of this state which has not been, but should be, settled by this Court.

(d) Where an interlocutory order of the Superior Court has been entered upon a determination by that court of the question to be certified, and

(1) The interlocutory order has sustained the controverted jurisdiction of the Superior Court; or

(2) The interlocutory order has vacated or opened a judgment of the Superior Court; or

(3) A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice, such as avoidance of expense or speedy determination of causes.

* * *

(4) *Procedure for Certification.* When it is desired to certify a question of law to this Court, the procedure for certification shall be as follows:

(a) The judge of the court below shall sign and file in the court below a certification in accordance with the requirements of paragraph (3) of this rule.

(b) The clerk of the court below shall, within five (5) days of the filing of such a certification, file with the clerk of this Court four (4) certified copies of the certification.

(c) Upon the receipt of the certified copies of the certification, the clerk of this Court shall forthwith docket the proceeding on certification in the same manner as other causes are docketed in this Court, shall deliver to each of the justices one certified copy of the certification, and shall send written notice to the parties to the cause of the date of the filing of such proceeding.

(d) After the docketing of the certification, it will be approved or disapproved by this Court. If disapproved, a certified copy of the order of disapproval shall be remitted to the lower court and copies thereof sent to counsel, and the cause shall thereafter proceed in regular course. If approved, the proceeding on cer-

tification shall be considered to have been duly instituted, and the clerk shall send written notice thereof to the parties to the cause. The record in the cause shall be the certification as filed.

(e) From the date of approval of the certification, further proceedings in the cause shall be governed by the rules of this Court, including the schedule for the filing of briefs and the hearing of argument.

(f) Briefs shall be filed in the order recommended by the lower Court in the Certification, unless this Court, at the time of approving the Certification, shall designate a different order. In any event, insofar as time for filing is concerned, the party or parties required to file the first brief shall be considered appellant and the other party or parties shall be considered appellee.

(5) *Supervision of Proceedings.* The supervision and control of proceedings on certification shall be in this Court from the time the certified copies of the certification are filed. Failure of a party to prosecute the cause shall not affect its validity but may be ground for action under Rule 27.

(6) *Court Below—Rule Making Power.* The Court of Chancery, the Superior Court and the Orphans' Court shall, by appropriate rule or rules, provide for orderly procedure within those courts for the certification of questions of law in accordance with this rule.

Rule 5(7)—Rules of the Supreme Court of Delaware.

Questions Which May Be Raised on Appeal.

On appeal, any question may be raised which has been fairly presented to the court below for decision, and it shall not be necessary again to raise any such question raised in the cause by way of motion for a new trial.

IN THE

SUPREME COURT OF THE STATE OF DELAWARE.

DOCKET NO. 32, 1970.

IN THE MATTER OF
FRANK A. LEVERING, DECEASED:

FRANCIS A. LEVERING, JR.,
PROPONDENT-APPELLANT BELOW,

Appellant,

v.

BLAIR S. LEVERING,
CONTESTANT, APPELLEE BELOW,

Appellee.

Petition for Re-Argument.

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PETITION FOR RE-ARGUMENT.

This Court in its opinion of September 23, 1970, in the above-captioned case, held that the Orphans' Court did not abuse its discretion by refusing to hear testimony by the subscribing witnesses of the contested will and cited in support thereof In Re *Collins*, Delaware, Super. 251 A. 2d 345, 1969.

The appellant contends that the refusal to hear live testimony by the subscribing witnesses is a denial of his rights to due process as guaranteed by the Delaware Constitution and the United States Constitution. Moreover, if the appellant's due process rights has not been violated, nevertheless, the Orphans' Court did not comply with the standards specified in *Collins'* case.

In Re *Collins*, *supra*, at page 347, quotes the following standard as to whether a trial de novo is to be the record or by live testimony:

> ". . . If the Court finds, after a review of a verbatim record, that the result below was clearly correct, it is justified in refusing an application for a fresh hearing of the evidence. If the decision below is not clearly correct, then this Court should hold a fresh hearing of the evidence."

The Orphan's Court failed to make a finding that the result below was "clearly correct" but simply stated in its opinion that it was refusing to hear the testimony of the subscribing witnesses because:

> "There was no indication that such presentation would differ in any material way from that presented below. Therefore, I declined to rehear any evidence in this case. Instead I reviewed the record in order to make de novo evaluation of the testimony."

The Court went on to hold that there was no "convincing evidence upon which a trier of fact could reasonably conclude that the testator had the requisite capacity to execute a will on June 15, 1968". Nevertheless, the Orphans' Court went on to state in its opinion that:

> "The only testimony that Mr. Levering was lucid at the time he executed the instrument came from the proponent, an interested party as sole beneficiary under the purported will, and the two witnesses to the instrument, one a social and business associate of the proponent who had never met or known the testator, and the other an aunt of the proponent's wife, who had not had occasion to visit and converse with the decedent for a couple of years prior to his hospitalization."

Clearly therefore the issue in the Orphans' Court was the credibility of the witnesses since there can be no doubt that there was testimony, at least by the two subscribing witnesses, that the testator did have the capacity to execute the said will. Since time immemorial, the issue of credibility has been based on a large extent on the demeanor of the witness. The cold printed transcript cannot begin to enlighten a trier of fact as to the credibility of a witness. Trials would be simple indeed if the trier of facts only had to review written records. The crucial issue in most cases is "who do you believe" and that task is a difficult task which cannot be justly performed without seeking and hearing the live witnesses. To do otherwise denies the appellant the right to a fair and just trial especially in a situation such as this where he is entitled by law to a "trial de novo".

In the instant case, the original trial was before a Register of Wills and not a judge. No matter how efficient or how conscientious the Register is, a trial before him

cannot rise to the level of a trial in the Superior or Orphans' Court. For example, in this case, the attorneys for both parties acted not only as attorneys but also as witnesses which is not only practically unheard of in the Superior Court but is discouraged, if not prohibited. Probably for this reason, the law provides for an appeal to the then Orphans' Court with a trial de novo; but in the instant case, the Appellant received what amounts to an appellate review rather than a new trial in the full sense of the word.

Consequently, the appellant is entitled to a new trial in which he would be afforded the opportunity to call live witnesses so that the court can see and hear the witnesses and reach a decision.

Consequently, the appellant seeks a re-argument on the issue of whether the refusal to hear the witnesses violated the appellant's due process rights and the standard set forth in the *Collins'* case.

Respectfully submitted,

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